

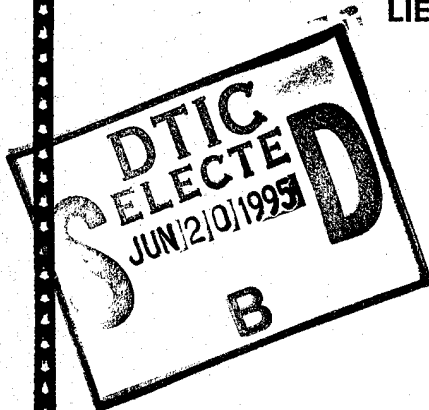
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NATURE'S ELDEST LAW: A SURVEY OF A NATION'S RIGHT TO ACT IN SELF-DEFENSE

BY

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ABSTRACT

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Changes in the world's political environment have had a significant impact on how nations interact with each other. One area of concern revolves around the lawful use of armed force. This study examines the legitimacy of a nation's use of military force in its self-defense. The customary international law of self-defense, as well as issues concerning self-defense under the United Nations Charter are reviewed. Finally, guidelines are suggested for evaluating whether military action may be properly applied.

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NATURE'S ELDEST LAW:¹
A Survey of a Nation's Right
To Act in Self-Defense

On April 14, 1993 Kuwaiti authorities uncovered an assassination plot against former President George Bush.² This plot was to be carried out against President Bush during a three day visit to Kuwait. From an intensive two-month investigation, the United States government determined that the explosive device contained features found only in bombs made by groups linked to Iraq.³ Further, public statements by the Saddam Hussein government following the Gulf War claimed that Iraq would hunt down President Bush and punish him.⁴ The United States concluded that the Iraqi Intelligence Service had been ordered to carry out the attack on President Bush. On June 26, 1993, President Clinton, claiming his actions were in self-defense under Article 51 of the United Nations Charter, ordered the United States military to launch an attack on the headquarters of the Iraqi Intelligence Service. Twenty-three cruise missiles were fired destroying the headquarters and killing six people.⁵ An assassination attempt by a foreign government against a former United States President; this was a clear case warranting a military response in self-defense. Or was it? The answer to this question is not as clear as it initially may seem.

With the increase in terrorism, the proliferation of weapons of mass destruction, border disputes, and ethnic unrest, it is becoming increasingly ambiguous when a nation may lawfully resort to the use of armed force for its self-defense and the defense of

other nations.⁶ Article 51 of the United Nations Charter attempts to codify the circumstances in which a nation may act in self-defense. Despite the express language of Article 51, much debate has taken place concerning the meaning of this article, when the right to act in self-defense accrues and, perhaps more important, when it ceases. Section I briefly reviews the customary international law concepts of a nation's right to resort to military force in its self-defense. In Section II self-defense under the United Nations Charter, and various arguments concerning its application, will be examined. Finally, Section III will suggest criteria to assist in the analysis of when the use of military force in self-defense is lawfully justified.

SECTION I CUSTOMARY INTERNATIONAL LAW

To understand the right of a nation to use military force in its own self defense, it is necessary to understand why this right exists. The recognized purpose of self-defense is to deter aggression and to protect the interests of the state.⁷ Its goal is preventive in nature and not retributive.⁸

In early times, the Spanish believed that the right of self-defense was limited to the protection of territory. Other writers of the day believed that the right extended to the violation of any national right.⁹ Fault by the other party was seen as a precondition to the legitimate exercise of the right of self-defense. Unfortunately, these early writers failed to

provide much guidance on the degree of injury or fault necessary to justify military action.¹⁰

Historically, states demanded a right of self-defense of considerable scope. Customary international law authorized a state, targeted by another state, to employ military force as necessary to protect itself.¹¹ The law recognized, as a minimum, the right of a state to act to protect against threats to its political independence or territorial integrity.¹² The right to act in self-defense was not limited only to instances of actual armed attack. States were permitted to act when the imminence of attack was of such a high degree that a nonviolent resolution of a dispute was precluded.¹³

The *Caroline* Case

The *Caroline* case is the most often cited precedent in the customary international law of self-defense. In 1837, during the revolt in Canada against the British, a ship named the *Caroline* would periodically sail from United States territory into Canada. It would reinforce and resupply the rebels and then return to the United States. To put an end to this, British forces entered the United States, seized the *Caroline* and destroyed her, killing two United States citizens.¹⁴ Upon receiving a protest from the United States, the British claimed they had acted lawfully in self-defense.

In an exchange of letters with the British government, Secretary of State Daniel Webster outlined what he believed were the conditions for a proper claim of self defense. Secretary

Webster stated that there " ... must be a necessity of self-defense, instant, overwhelming, leaving no choice of means and no moment for deliberation." He further argued that the act should involve "nothing unreasonable or excessive, since the act justified by the necessity of self-defense must be limited by that necessity and kept clearly within it."¹⁵ While never admitting culpability, the British apologized to the United States for the incident. Secretary Webster's *Caroline* criteria, described in the literature as those of "necessity" and "proportionality", continue to form the basis for analysis of the right of self-defense.

"Necessity" is the most important precondition to the legitimate use of military force in self-defense. In determining whether the use of military force is necessary, many factors must be carefully balanced. These factors include the nature of the coercion being applied by the aggressor state, the aggressor state's relative size and power, the nature of the aggressor's objectives and the consequences if those objectives are achieved.¹⁶ The target state makes the initial determination of the necessity of the use of military force in self-defense.¹⁷

"Proportionality" is the "... requirement that the use of force or coercion be limited in intensity and magnitude to what is reasonably necessary promptly to secure the permissible objectives of self-defense."¹⁸ Because the purpose of self-defense is to preserve the *status quo*, proportionality requires that military action cease once the danger has been eliminated.

Despite widespread reference to the *Caroline* factors, they have not been accepted without criticism. Having been written in an era when an enemy literally had to be massed on the border to be a threat, many argue that these criteria are too restrictive. With nuclear weapons and rapid delivery techniques, the requirement that no action be taken until "... force be overwhelming, leaving no choice of means and no moment for deliberation" is seen by some commentators as unrealistic in today's world.¹⁹ Nonetheless, The *Caroline* factors continue to be relied upon in the analysis of potential self-defense situations.

When does the Right of Self-Defense Arise?

The prerequisite to the lawful right to act in self-defense is an injury (violation of a legal obligation), inflicted or threatened, by one state against a substantive right of another state.²⁰ It is generally accepted military force may be used to:

1. Protect a nation's political independence. Every nation has a responsibility to respect the political independence of every other nation. Force may be used to protect such independence when it is threatened and all reasonably available peaceful avenues have proved unavailing.

2. Protect a nation's territorial integrity. Each nation has an inherent right to protect its national borders, airspace and territorial waters from acts of aggression.

3. Protect citizens and their property abroad. A state has a right to protect its citizens abroad if their lives are placed

in jeopardy and the host state is either unwilling or unable to provide the necessary protection.²¹ .

While these rights are widely acknowledged in the customary international law, they are not absolute. They must be balanced against similar rights enjoyed by other nations and the maintenance of peace in the international community.²² When, in the judgment of the injured state, the necessity of acting in self-defense outweighs any harm such act imposes, it may lawfully resort to the use of military force.²³

SECTION II THE UNITED NATIONS CHARTER

Following World War II, the United Nations was established to, among other things, establish a new world order and provide a forum in which international disputes may be resolved without the use of armed force. The United Nations Charter has as a central theme the maintenance of peace and security between nations. Its aim is to substitute a community response for unilateral action in deterring aggression.²⁴ Three objectives form the foundation of this new world order. They include:

1. The maintenance of an orderly world which emphasizes cooperation among nations;
2. A preference for change by peaceful processes rather than coercion; and,
3. The minimization of destruction.²⁵

The United Nation Charter condemns aggression and requires the use of peaceful means to settle disputes. To facilitate this

process, the Charter establishes the Security Council which is given the responsibility for maintaining international peace through community action. While preferring community action, the Charter also recognizes a nation's inherent right to take unilateral action in self defense.²⁶ An understanding of the interrelationship of the responsibilities of the Security Council with the right to act in self-defense is essential to fully comprehend the right of a nation to protect its national interests.

Charter Articles Related to the Right of Self-Defense and the Role of the Security Council

One might be tempted to conclude that a review of Article 51 alone is sufficient to analyze self-defense situations. This is not the case. A nation's right to act in self-defense, as contemplated by the United Nations Charter, cannot be fully appreciated without first understanding the context in which it is applied. The underlying goal of the United Nations is the peaceful settlement of disputes and the Charter assigns to the Security Council many dispute resolution responsibilities. The articles directing this process are summarized below.

Article 2 of the United Nations Charter outlines the general principles by which Member states are to conduct themselves. Article 2(3) cautions all members to settle their international disputes by peaceful means that will ensure international peace and security are not endangered. Article 2(4) requires all Member states to refrain from the threat, or use, of force against the territorial integrity and political independence of

other states. Article 2(7) reaffirms the Charter's international scope and precludes United Nations action in situations that are purely domestic in nature. Taken as a whole, Article 2 expresses the general principle that the use of force, or the threatened use of force, violates the mandates of the United Nations Charter and is illegal. Thus, a state may not intervene or enter the territory of a sovereign, stop, divert, board, detain or otherwise interfere with another state's aircraft or ships.²⁷

Article 24 identifies the Security Council as having the primary responsibility for the maintenance of international peace and security.

Article 33 requires member states to resolve their disputes peacefully.

Article 36 permits the Security Council, at any stage of a dispute, to recommend settlement proposals to the parties.

Article 37 requires nations who fail to peacefully resolve their disputes to refer them to the Security Council.

Article 39 of the Charter requires the Security Council to decide whether there has been a breach of the peace or an act of aggression committed. It further requires the Security Council to determine what actions are necessary to restore the international peace.

Definition of Aggression - Article 39 uses, but fails to define, the term "aggression". Since this is a fundamental issue that must be determined by the Security Council, specific criteria were needed.²⁸

In 1974 the United Nations General Assembly passed Resolution 3314.²⁹ This resolution specifically defines the term "aggression" as "... the use of armed force by a state against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations" The definition also provides extensive examples of actions that would constitute aggressive acts by one State against another. With the adoption of this definition, the Security Council now has available objective criteria against which a State's actions may be measured.

Actions Available to the Security Council - Article 39 empowers the Security Council to identify and take the measures necessary to restore international peace and security. In such an event, the Security Council is directed to Articles 41 and 42 which authorize the imposition of sanctions (Article 41)³⁰ or military action (Article 42).³¹

ARTICLE 51 OF THE UNITED NATIONS CHARTER

The United Nations Charter recognizes the use of military force as lawful in only two instances, either as part of a United Nations authorized military operation to restore the peace under Article 42 or for self-defense under Article 51.³² Article 51 provides:

Nothing in the present Charter shall impair the inherent right of individual or collective self defense if an armed attack occurs against a Member of the United Nations until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise

of the right of self defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

Despite the seemingly clear language of this article, considerable controversy surrounds the extent to which a Member may take action in self-defense under the Charter. Many international law scholars argue that the customary international law doctrine of self-defense, as developed from the *Caroline* case, survives under the Charter. These scholars believe that the Charter was not intended to restrict the right of a nation to take defensive action in any material way.³³ Article 51, it is argued, is only included to accommodate regional security organizations who wanted to ensure their mutual defense arrangements would be permitted under the Charter.³⁴ In their view, the traditional instances in which a state may act in self-defense remain unimpaired.

Others argue that while the right to self-defense exists in the customary international law, each member of the United Nations, by adopting the Charter, have waived their rights to those aspects of self-defense that are not specifically permitted under Article 51.³⁵ They reason that the United Nations was established to create a new world order and that reliance on the customary international law would be counterproductive to that goal.³⁶

While the majority of the experts in the field hold the opinion the right of self-defense remains unimpaired under the

Charter, this dispute remains largely unresolved. Two contentious issues receive particular attention. First, may a nation legitimately take military action in anticipation of an armed attack? Second, may a nation continue to act in self-defense although the Security Council has taken the measures it deems necessary to restore the peace? Each of these issues shall be discussed in turn.

ANTICIPATORY SELF-DEFENSE UNDER THE UNITED NATIONS CHARTER

There is little question that before the Charter, a right to act in self-defense, to include anticipatory self-defense, was recognized by the customary international law.³⁷ Article 51 with its language "...if an armed attack occurs...", raises an issue of whether a limitation now exists on a nation's ability to lawfully invoke that right. More specifically, does the Charter restrict the traditional right of self-defense only to those occasions when an armed attack has actually taken place?

As with the term "aggression", the Charter fails to define the term "armed attack". In failing to do so, the drafters have introduced an additional element of controversy into this area of the law. To shed some light on this issue, many scholars have attempted to identify the various elements of an armed attack. One commentator has proposed a simple definition containing two elements: (1) the application of force by one state against another; and, (2) offensive intention.³⁸ Another commentator suggests that the phrase includes: (1) direct attacks across

international borders; and, (2) indirect attacks consisting of the sending by, or on behalf of, a state, armed groups of mercenaries into another state where they carry out acts of armed force of such gravity as would constitute an armed attack if conducted by regular forces.³⁹ While these definitions have some utility, they fall far short of establishing whether international law, after the adoption of the U.N. Charter, recognizes a nation's right to act in anticipatory self-defense. Two views on this subject are apparent from the literature.

Restrictivist View - Critics of the customary right of anticipatory self-defense have been variously referred to as belonging to the "restrictive school",⁴⁰ or as holding the "textulist view".⁴¹ These critics believe that Member states have only those rights affirmatively granted by the Charter. By agreeing to the language of Article 51, Member states have waived their rights under the customary international law and agreed to act in self-defense in response to an actual armed attack. A massive build up of offensive forces along the border by an unfriendly neighbor, to the "restrictivist", would justify application to the Security Council for assistance, but not the unilateral use of force.⁴²

Advocates of this narrow reading of Article 51 point to two policy considerations in support of their position. First, determining an armed attack is imminent is extremely difficult.⁴³ An error in calculation could lead a militarily powerful nation to start a war of massive proportions based on the mistaken

belief that it is about to be attacked.⁴⁴ The restrictivist argues it was to avoid this possibility that the Charter requires an actual armed attack before a nation could resort to the use of armed force. Secondly, anticipatory self-defense is grounded in customary international law that provides no clear guidelines for its use.⁴⁵ Permitting nations to judge for themselves the appropriate circumstances in which it may be applied is too dangerous.

This philosophy represents the minority view.

Expansivist School - The predominant view, to which the United States subscribes,⁴⁶ has been termed by one commentator as the "Expansive School".⁴⁷ Those who hold this view advocate Article 51 permits anticipatory self-defense in response to an imminent armed attack. Expansivists see those holding the restrictive view as reading the words "...if an armed attack occurs..." as meaning "... if, and only if, an armed attack occurs...", an interpretation the Expansivist sees as insupportable.

Expansivists argue that the restrictive view is a marked departure from the customary international law and that such a departure should not be lightly presumed. They believe that since Article 51 does not unequivocally limit the right of self-defense, it should not be construed as eliminating the customary law right to defend against a threatened attack.⁴⁸ Further, the use of the phrase "...inherent right of individual or collective defense...." suggests, to the Expansivist, the right of self-

defense is a fundamental one, not to be restricted or qualified without clear, express language in the Charter.⁴⁹ Finally, Expansivists point out the practice of the Member states, since the Charter was adopted, has been inconsistent with the restrictive view.⁵⁰

One advocate for the expansive reading of Article 51 states:

It would be a travesty of the purposes of the Charter to compel a defending state to allow its assailant to deliver the first, and perhaps fatal, blow.... To read Article 51 otherwise is to protect the aggressor's right to the first strike.⁵¹

This observation is particularly compelling in the era of nuclear weapons and modern delivery systems. The destructive capability of modern weapons, and the reduced reaction time, pose a tremendous threat to the nonaggressor nation. As one commentator has put it, "No one could seriously contend that any nation in the world should commit suicide by failing to prevent an imminent armed attack by its enemies."⁵²

Drafters Intent - The meaning of the term "armed attack" is not readily apparent from the text of Article 51. Article 51 states that "Nothing in the Charter shall impair the inherent right of individual or collective self-defense..." One could infer from this clause that the Charter adopts the customary international law to include anticipatory self-defense. However, Article 51 specifically mentions only armed attacks and is silent as to actions available in case of imminent attack.

The debates that took place during the drafting of the Charter suggest that there was no intent to exclude anticipatory

self-defense from the application of Article 51.⁵³ In a report issued before the adoption of the Charter, the drafting committee has said that "The use of arms in legitimate self-defense remains admitted and unimpaired."⁵⁴ This language implies that the Committee adopted the customary international law and is consistent with the position that anticipatory self-defense is considered to fall within the intent of the Charter.

Reading Article 51 to exclude anticipatory self-defense would also be inconsistent with Article 2(4) of the Charter. This article forbids not only the use of force, but the threat of the use of force. To deny a nation the ability to take defensive actions in the face of imminent attack would serve no useful function and would be contrary to a stated purpose of the United Nations to maintain international peace and security. This is particularly true in an era where complete destruction with incredible speed from great distances is a real possibility.

"Realism, common sense, and the destructive nature of modern weapons demand the retention of this customary right (to act in anticipation of an imminent attack) under adequate safeguards until the community system makes its use no longer necessary."⁵⁵ "No state can be expected to await an initial attack which, in the present state of armaments, may well destroy the state's capacity for further resistance and so jeopardize its very existence."⁵⁶ There is no clear indication that the drafters of the Charter intended such a result.

THE EFFECT OF SECURITY COUNCIL ACTIONS ON THE RIGHT TO SELF-DEFENSE

Article 51 requires Member states to immediately report to the Security Council any measures taken in self-defense. These reporting requirements are intended to provide the Security Council with notice of the events surrounding the use of force to enable it to take the measures it deems necessary to restore international peace and security. These reports are not a precondition to the lawfulness of the use of force. The absence of such a report, however, may be construed by the international community as an indication the state was not convinced it was legitimately acting in self-defense.⁵⁷

Once defensive military actions are reported by a Member state, the Security Council is charged with deciding what measures are necessary to restore the peace. What happens to a nation's right to engage in self-defense once the Security Council has taken action? Two opposing views are advanced in the literature on this subject.

One point of view holds the Security Council has plenary authority in this area and that its actions preclude further self-defense measures. Advocates of this position believe the right of self-defense may be exercised only before the United Nations takes action.⁵⁸ They argue it would be inconsistent with the creation of a new world order to allow nations to invoke Article 51 after the Security Council has decided what measures are necessary to end the conflict.

Several policy considerations are advanced in support of

this position. First, the credibility of the United Nations would be undermined if the Security Council's actions were circumvented. Second, the world's view of the nation taking defensive measures would be enhanced if it accepted the Security Council's measures. Third, the costs of restoring order would be more equitably distributed in actions undertaken by the United Nations. Finally, for a world organization to be successful, Member states must surrender some degree of sovereignty.⁵⁹ Even former Secretary General Perez DeCuellar has expressed concerns that a nation's Article 51 right to act in self-defense may become inoperable once the Security Council has taken action.⁶⁰

The opposing position is that Security Council actions do not prevent continued self-defense measures if those actions have not had the necessary effect of halting acts of aggression.⁶¹ One commentator argues it would be absurd to conclude that Security Council action terminated the right to engage in self-defense activities.⁶² He reasons that Security Council action can not be intended to deprive a state its right to defend itself when the invader has not complied with the Council's order.⁶³ Actions by the Security Council which have the desired effect of stopping the hostilities would, of course, terminate the right to engage in self-defense activities. Actions that did not halt such aggressive conduct would not preclude a nation from acting in its own defense.

One underlying issue in this debate is the question of who decides whether the Security Council has taken the measures

necessary to maintain international peace and security. It is argued that a defending state will be denied the right to protect its own interests if the Security Council, alone, has the power to make this determination.⁶⁴ Such an interpretation places the defending state in a difficult position. It can be denied its freedom of individual action in self-defense without any guarantee that the United Nations' measures will have the necessary effect. On the other hand, to allow the defending state to make this determination creates the possibility that unilateral action will override collective action in matters of international peace and security.⁶⁵

A middle ground has been proposed.⁶⁶ Under this proposal, the question of whether the necessary measures have been taken to terminate an act of aggression is to be decided objectively as a question of fact. Each party, the Security Council and the defending state, is permitted to make their own determination of that fact. Should the individual state reach a conclusion different from the Security Council it may continue its military response. The state, however, runs the risk of being declared the aggressor by the Security Council under Article 39. Such a finding would subject the defending state to sanctions or enforcement actions.

This proposal is consistent with the customary international law. It allows the defending state to take the actions it believes are necessary for its own defense.⁶⁷ At the same time, it allows the international community to review that decision

under the necessity and proportionality criteria.⁶⁸ In addition, the concerns of both groups are addressed by this process. This method permits a nation to defend itself while maintaining the Security Council's responsibility for preserving international peace and security.

COLLECTIVE SELF-DEFENSE

The Charter in general, and Article 51 in particular, adopts the customary international right of collective self-defense. To constitute a legitimate exercise of collective self-defense, all conditions for the exercise of individual self-defense must be met with one additional requirement.⁶⁹ The defending state must have declared itself the victim of an armed attack and requested assistance.⁷⁰ Further, there is no recognized right of a third party state to intervene in internal conflicts where the issue in question is one of a group's right of self-determination.⁷¹ Finally, treaties, alone, do not provide adequate justification for a third party state to intervene.⁷² There must be an independent, underlying legal justification that meets the requirements of self-defense.⁷³

SECTION III SELF-DEFENSE CRITERIA

Questions concerning whether a nation is entitled to act in self-defense often spring from an ambiguous conglomeration of facts. While it is difficult to create a model which will resolve all issues in all cases, it is useful to have some method

for analyzing differing fact patterns. The following questions are offered as a basis for evaluating the legitimacy of the use of military force in self-defense.⁷⁴ Accompanying each question is a brief discussion of its significance to the analysis.

1. Is the proposed response aimed at protecting the *status quo*?

Actions in self-defense, like those taken in the Gulf War, are preventive in nature. Actions that have retribution as the objective are not self-defense and are aggressive in nature.

2. Has there been a violation of a legal obligation?

Each Member state of the United Nations is obligated by Article 2(4) to refrain from using force or threats of force against the territorial integrity or political independence of any state. Threats to either of these fundamental values would violate that legal duty. Some commentators have included threats to citizens, with a concurrent failure, or inability, of the host government to afford protection, as sufficient grounds for invoking Article 51 self-defense rights. The United States has adopted this position. This policy may be seen in the U.S. actions taken in the failed attempt to rescue U.S. hostages in Iran (1981), as well as the successful operations in Grenada (1982) and Panama (1989).

3. Has there been an actual armed attack from an external source?

As distinguished from anticipatory self-defense which will be discussed later, the clearest case for self-defense arises when one state has been subjected to armed attack by another state or an organization sponsored by another state. Article

2(7) cautions that entities internal to the state are not subject to the jurisdiction of the Security Council and are not governed by Article 51.

4. Is the response, or proposed response, timely?

Actions in self-defense must not be remote in time from the initial aggression. A delayed response may be seen by the international community as a threat to international peace and security. The need for immediacy (necessity) of action is lost if too much time lapses between the initial overt act of aggression and the defensive reaction.

5. Is the military response in self-defense necessary?

Article 2(3) of the Charter cautions all Member states to resolve their disputes by peaceful means. Article 33 requires parties to a dispute to refer it to the Security Council should they fail in its resolution. Before military force may be used in self-defense, the threatened state is required to attempt all practicable, peaceful means to resolve the dispute. If there is a realistic, meaningful alternative to military action, self-defense is not available. There is, however, no requirement to exhaust all peaceful means if it would be fruitless to do so. If, however, the need for military action is not clear, it is not justified.

6. Is the military response in self-defense proportionate to the threat?

A nation acting in self-defense may use force no greater than that needed to halt the danger posed by an aggressor nation. The response must be proportional in terms of both the nature and

the amount of force employed to repel the attack. An excessive response may be viewed by the Security Council as an aggressive action and subject the defending nation to sanctions or enforcement actions.

7. Has any military response been immediately reported to the Security Council?

Article 51 requires military actions taken in self-defense be immediately reported to the Security Council. This permits the Security Council to take the actions it deems appropriate to restore international peace and security. The failure to timely report such actions may be viewed as a lack of conviction by the defending state its actions were lawful. Further, quick notification of the Security Council allows a more rapid response aimed at terminating the armed aggression.

8. Has the Security Council taken meaningful, effective measures to stop the aggressive conduct?

Once the Security Council takes effective action to end the aggressive acts of a state, the target state must cease its self-defense activities. The failure to do so will be viewed as an aggressive act itself. Each nation must decide for itself whether the acts of the Security Council are sufficient to restore international peace and security. Should a nation acting in self-defense decide the U.N. actions are insufficient, it may continue to act in its own self-defense. That nation, however, runs the risk of the international community reaching a different conclusion and imposing sanctions.

ANTICIPATORY SELF-DEFENSE

The circumstances for acting in anticipatory self-defense are the same as those for self-defense except that an actual armed attack has not yet occurred. They often arise in situations involving state supported terrorism such as when the United States found it necessary to attack Libya in 1986. The conduct of a nation engaging in preemptive actions will be reviewed against the totality of the circumstances existing at the time the decision to take action was made. In other words, the reasonableness of the conduct will be examined. The key question is:

Is there an imminent or immediate threat of an armed attack?

In determining whether an attack is imminent, justifying preemptive action, several factors should be considered:

1. Are there objective indicators that an attack is imminent?

Factors such as troop buildups, increased alert levels, increased training tempo, and reserve call-ups may suggest that an attack is imminent.

2. Does the past conduct or hostile declarations of the alleged aggressor reasonably lead to a conclusion that an attack is probable?

A pattern of aggressive past conduct or hostile public statements may demonstrate an intention by an aggressor nation to launch an armed attack.

3. What is the nature of the weapons available to the alleged aggressor nation and does it have the ability to use them effectively?

Weapons of mass destruction and modern delivery systems make

waiting for an actual armed attack exceedingly dangerous. While possession of such weapons alone is not indicative of an intent to use them, it is a factor that must be considered with all other relevant factors.

4. Is the use of force the last resort after exhausting all practicable, peaceful means?

Unlike actions in self-defense following an armed attack, preemptive actions generally mean some time is available for peaceful resolution. There will be closer scrutiny of the efforts made to resolve a dispute when a nation acts in a preemptive manner. The failure to exhaust practicable remedies may result in sanctions for aggressive conduct.

COLLECTIVE SELF-DEFENSE

One additional criterion exists when collective self-defense is contemplated:

Has the target state requested assistance?

Without such a request, as was made by Kuwait in 1990, a third party nation will be seen as having improperly intervened in the situation. This intervention may be seen as an aggressive act justifying the imposition of sanctions by the United Nations.

SELF-DEFENSE CRITERIA APPLIED

Returning to the missile attack on Iraq described in the introduction, how would the United States claim of self-defense fare when compared against the proposed criteria? A review of the criteria demonstrates that this claim, which on its face has

a certain appeal, falls short of requirements for properly invoking Article 51. Each element is briefly reviewed below.

1. Was the response aimed at protecting the *status quo*?

With the alleged attack occurring in April and the response conducted in June, it is difficult to conclude the actions of the United States were preventive in nature. The attempted attack had already been averted when the Kuwaiti government exposed the plot and arrested those involved.

2. Was there a violation of a legal obligation? If the conclusion by the United States that the assassination attempt against former President Bush was ordered by the Iraqi government is correct, there has been a violation of a legal obligation. Iraq is required to respect the territorial integrity and political independence of the United States. These rights, absent a state of war, are infringed when a political leader is identified for assassination by a foreign government.

3. Has there been an actual attack? A state directed assassination attempt against a former President may properly be seen as an attack against the United States and its sovereignty. Such an attempt was not merely a random act, but a carefully designed plot to punish President Bush for his actions in executing his office as the head of the United States Government.

4. Was the response timely? This criterion represents one of the biggest obstacles to the United States claim of self-defense under Article 51. More than two months passed from the date the assassination attempt was exposed to the date military

action was taken. During this time the United States conducted an investigation to determine who was behind the plot. Only upon satisfying itself as to its origins did the United States respond militarily. The need for immediacy of action, however, is difficult to support after the passage of more than two months. No current or imminent attack was being thwarted by the U.S. actions.

5. Was the military response necessary? This requirement also poses some difficulty for the U.S. claim of self-defense. No attempt was made to resolve this issue through peaceful means. With the passage of time the need for a military response became more and more remote. It cannot be determined whether further U.N. sanctions or enforcement actions would have been futile because that option does not appear to have been explored.

6. Was the response proportionate? The attack was aimed at the headquarters of the Iraqi Intelligence Service, the organization identified as being behind the assassination plot. Collateral damage was minimized. Twenty-three cruise missiles were fired with the resultant loss of life limited to six people. The requirement for a proportionate response appears to have been met by its restrictive nature and limited collateral damage.

7. Was the action immediately reported to the Security Council? This criterion was also met. The United States requested a special meeting of the Security Council for the next day. At that meeting the United States advised the Security Council of the actions it had taken and the reasons therefore.

8. Did the Security Council take meaningful, effective measures to stop the aggressive conduct? The Security Council only learned of the actions after they had taken place. The United States did not request any formal statement or resolution approving its actions. As the military response by the United States had been completed, there was little for the Security Council to do.

Perhaps the more plausible claim of self-defense available to the United States is that it was acting to preempt future attacks by Iraq against the national interests of the United States. This argument, however, is not without its problems. The United States did not demonstrate that an imminent threat of armed attack existed at the time military actions took place in June. There were, however, several factors which would have supported this claim. First, public declarations by Iraqi government officials indicated an intent to take action against a former U.S. President. Their actions in April clearly indicated an intent to take steps to carry out those threats. Further, as a nation identified as supporting terrorism, Iraq has demonstrated a willingness and an ability to use those tactics against the interests of the United States.

The difficulty the United States has in sustaining a claim of anticipatory self-defense is that it has not pointed to any evidence that Iraq was planning any further attempts against the United States. It is difficult, therefore, to conclude that the missile attack in June, 1993 preempted any aggressive actions by

Iraq.

In matching the response of the United States against the proposed criteria, a claim of the need to act in self-defense under Article 51 of the United Nations Charter lacks substance. In pressing its claim of self-defense before the United Nations, the United States was no doubt aided by a general lack of respect by the world community for Saddam Hussein and Iraq. Little criticism was leveled at the United States for the actions it took. This lack of criticism resulted not so much from a consensus that the actions of the United States were a legitimate exercise of the right to act in self-defense but rather from a general disapproval of the Iraqi government.

CONCLUSION

The use of military force in national self-defense is a right long recognized by the international community. Under customary international law nations are permitted to act in self-defense if there is a need to do so and the extent of the military response is not disproportionate to the threat. With the establishment of the United Nations, whose goal is to establish a new world order aimed at maintaining international peace and security, the extent of a nation's right to act in self-defense is less clear.

Considerable controversy surrounds the ability of a nation to take preemptive action to defend against a perceived imminent threat or to continue its defensive efforts after the Security

Council has taken measures aimed at ending the hostilities. Most scholars support the right of nations to take these actions in their own defense. Those in the minority, however, make many valid points in arguing that such conduct is contrary to the purposes of the United Nations and undermines the authority of the Security Council. The extent of the right to act in self-defense is not always clear and considerable debate continues over these issues.

The criteria discussed in Section III are offered to assist in the analysis of whether the right to act in self-defense has accrued. They are intended to assist the policy makers in reviewing a particular set of circumstances and making informed decisions concerning the appropriate course of conduct. In conducting that analysis it must be remembered that the reasonableness of the actions taken is the key factor in appraising whether defensive actions are justified. It is on this basis that the international community will ultimately judge a nation's conduct.

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ENDNOTES

1. Quotation from Dryden: "Self-defense is nature's eldest law."
2. Richard Bernstein, "U.S. Presents Evidence to U.N. Justifying its Missile Attack on Iraq", New York Times, June 28, 1993, Section A, Page 7.
3. "Excerpts From U.N. Speech: The Case For Clinton's Strike", New York Times, June 28, 1993, Section A, Page 7.
4. Ibid.
5. "Clinton's First Strike", The Economist, July 3, 1993, vol. 328, issue 7818, page 16.
6. It is necessary to distinguish self-defense from self-help. A nation may act in self-defense to protect essential national rights from irreparable harm when no reasonable, alternate means of protection is available. Its purpose is the deterrence of aggression and the preservation or restoration of the legal *status quo*. Self-help, on the other hand, is remedial or repressive in character. It is a punitive or retributive action in response to either some past unlawful act or as a sanction to enforce legal rights. Common forms of self-help are reprisal or intervention.
7. James Francis Gravelle, "The Falkland (Malvinas) Islands: An International Law Analysis of the Dispute Between Argentina and Great Britain." Military Law Review 107 (1985), 56.
8. Bowett, 20.
9. D.P. O'Connell, International Law, Oceana Publications, Inc., (1965), 339.
10. Ibid.
11. Myres S. McDougal, "The Soviet-Cuban Quarantine and Self-defense", The American Law Journal of International Law, 57, no. 3 (1963), 597-598.

12. Brunson MacChesney, "Some Comments on the "Quarantine" of Cuba", The American Journal of International Law, 57, no. 3, (1963), 595.
13. McDougal, "The Soviet-Cuban Quarantine and Self-Defense", 598.
14. O'Connell, 343.
15. Jennings, 420. See also: O'Connell, 343.
16. Uri Shoham, "The Israeli Aerial Raid Upon the Iraqi Nuclear Reactor and the Right of Self-Defense", Military Law Review, 109, (Summer 1985) 193.
17. McDougal, "The Soviet-Cuban Quarantine and Self-Defense", 598.
18. M. McDougal and F. Florentino, Law and Minimum World Order, (1961): 242.
19. McDougal, "The Soviet-Cuban Quarantine and Self-Defense", 598.
20. Bowett, 9.
21. Department of the Army, Operational Law Handbook, 2nd ed. (Draft), (1992), 38-39. See also: Bowett, 270.
22. Bowett, 270.
23. Ibid.
24. MacChesney, 593.
25. John Norton Moore, Law and the Indo-China War, Princeton University Press (1972), 170-171.
26. Gravelle, 57.
27. Richard J. Erickson, Legitimate Use of Military Force Against State Sponsored Terrorism, Air University Press, (July 1989), 129.
28. In 1970 the General Assembly adopted resolution 2625 which shed some light on this issue but failed to specifically define the term. In this resolution the General Assembly stated that:

Every State has the duty to refrain from the threat or use of force to violate the existing international boundaries of another State or as a means of solving international disputes, including territorial disputes and problems concerning

frontiers of States.

This resolution further went on to caution:

Every State has the duty to refrain from any forcible action which deprives peoples referred to in the elaboration of the principle of equal rights and self-determination of their right to self-determination and independence.

(General Assembly Resolution 2625, 25 GAOR Supp. (No. 28), U.N. Doc. A/9631 (1970), 121-124.)

29. General Assembly Resolution 3314, 29 GAOR Supp. (No. 31), U.N. Doc. A/9631 (1974): 142-144. The full text of the definition of "aggression" reads:

Article 1

Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition.

Explanatory note: In this Definition the term "State":

- (a) Is used without prejudice to questions of recognition or to whether a State is a member of the United Nations;
- (b) Includes the concept of a "group of States" where appropriate.

Article 2

The first use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.

Article 3

Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of Article 2, qualify as an act of aggression:

- (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
- (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
- (c) The blockade of the ports or coasts of a State by the armed forces of another State;
- (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
- (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the

termination of the agreement;

(f) The action of a State in allowing its territory, which it has placed at the disposal of another state for perpetrating an act of aggression against a third State;

(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

Article 4

The acts enumerated above are not exhaustive and the Security Council may determine that other acts constitute aggression under the provisions of the Charter.

Article 5

1. No consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression.

2. A war of aggression is a crime against international peace. Aggression gives rise to international responsibility.

3. No territorial acquisition or special advantage resulting from aggression is or shall be recognized as lawful.

Article 6

Nothing in this definition shall be construed as in any way enlarging or diminishing the scope of the Charter, including its provisions concerning cases in which the use of force is lawful.

Article 7

Nothing in this Definition, and in particular article 3, could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist regimes or other forms of alien domination; nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration.

Article 8

In their interpretation and application the above provisions are interrelated and each provision should be construed in the context of the other provisions.

30. Article 41 reads:

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

31. Article 42 reads:

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

32. Lung-Chu Chen, An Introduction to Contemporary International Law: A Policy Perspective, Yale University Press, (1989), 122.

33. Moore, 367.

34. Moore, 367.

35. Elliott, 67.

36. See generally: Elliott, 55-81; and, Isaak I. Dore, "The United States, Self-Defense and the U.N. Charter: A Comment on Principle and Expediency in Legal Reasoning", Stanford Journal of International Law, 24, No. 1, (Fall, 1987), 1-19.

37. Bowett, 188-189. See also: M. McDougal, Law and Minimum World Order, 219.

38. Erickson, 134-136.

39. Jennings, 418.

40. Erickson, 136.

41. Chen, 322.

42. Erickson, 136.

43. Ibid, 138.

44. Wolfgang Friedman, The Changing Structure of International Law, Columbia University Press, 259.

45. Erickson, 138.

46. Examples of the United States following the "Expansivist" view would include the Cuban blockade in 1962 and the 1986 raid on Libya.

47. Ibid.

48. Elliott, 67, note 64.

49. C.G. Fenwick, "The Quarantine Against Cuba: Legal or Illegal?", The American Journal of International Law, 57, no.3 (July 1963), 589.
50. Bowett, 188.
51. Sir Claud Humphrey Meredith Waldock, "The Regulation of the Use of Force by Individual States in International Law", 81 Hague Recueil 45, (1952), 498.
52. Shoham, 198.
53. O'Connell, 341.
54. Report of Rapporteur of Committee 1 to Commission I, 6 U.N.C.I.O. Docs. 446, 459.
55. MacChesney, 595.
56. Bowett, 191.
57. Jennings, 423, note 22.
58. Elliott, 70.
59. Ibid. 73-79.
60. "U.N. Article 51 May Not Permit Strike At Iraq", The Washington Post, November 9, 1990, Sec. A, P. 30.
61. Jennings, 423, note 22.
62. Oscar Schachter, "United Nations Law in the Gulf Conflict", American Journal of International Law, 85, no. 3, (July 1991), 488.
63. Ibid.
64. Bowett, 195.
65. Ibid. 196.
66. Ibid.
67. Ibid. 193. See also: Gravelle, 60-61.
68. McDougal, "The Soviet-Cuban Quarantine and Self-Defense", 599.
69. Erickson, 163.
70. Jennings, 422.

71. Operational Law Handbook, D-39.

72. Ibid., D-40

73. Elliott, 56, note 6.

The most notable recent case of collective self-defense involving the United States was the Iraqi occupation of Kuwait. In discussing the actions of the United States, Secretary of Defense Dick Cheney stated: "Given the request by the government of Kuwait under Article 51 of the U.N. Charter - the inherent right of self-defense - we do not require any additional authority (to attack Iraq)." In making this statement, Secretary Cheney announced the apparent position of the United States that United Nations resolutions may complement, but do not restrain, Member States in exercising the right of collective self-defense found in Article 51.

74. See generally: Bowett, 269; Dore, 2; Erickson, 217-226; Jennings, 422; Shoham, 204; Operational Law Handbook, D-39 - D-40.

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